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IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner, Eastern Associated Coal Corporation, and Respondents, United Mine Workers of America, District 17, and United Mine Workers of America, Local Union 1503 (collectively "Union") are parties to a collective bargaining agreement known as the National Bituminous Coal Wage Agreement ("Wage Agreement"). The Wage Agreement covers a wide variety of mining and related jobs at Eastern Coal and other mining companies.

A. Article XXIV of the Wage Agreement sets out a detailed "Discharge Procedure." Jt. App. 30-32.

Section (a) of Article XXIV establishes the following standards with respect to employee discharges:

> No Employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement. [Jt. App. 30.]

Sections (b)-(d) of Article XXIV, in their turn, provide a three step process that an employer must follow in order to perfect the discharge of an employee. Jt. App. 30-31.

The first step in the discharge process is for "the Employee [to] be suspended with intent to discharge and . . . given written notice stating the reason, with a copy to the [Union's] Mine Committee." Jt. App. 30.

The next step in the process is a meeting—to be held "[a]fter 24 hours, but within 48 hours" of the written notice—between the employee and a member of the Union Mine Committee (and on request a representative of the Mine Workers District), on the one hand, and the "mine superintendent or manager" (and sufficient other

representatives of the employer to have an equal number with the Union at the meeting), on the other. Jt. App. 30. "If the Employer informs the Employee at the meeting . . . that he still intends to discharge the Employee . . ., the Employee remains suspended with intent to discharge for a period of time necessary to permit him to file a grievance and have it arbitrated." *Id.* "If the Employee does not file a grievance within five days of the notice of suspension with intent to discharge, the discharge shall become effective immediately." *Id.* at 30-31.

As the third step in the process, section (d) of Article XXIV provides for "Immediate Arbitration" that may be invoked if the Union "believes that just cause for discharge does not exist." Jt. App. 31.[1] Once the immediate arbitration procedure has been invoked, "[t]he next available district arbitrator [is] immediately . . . assigned to hear the case" and must "hear the case within five days." *Id.* "At the conclusion of the hearing, the district arbitrator . . . announce[s] his decision which [is] binding on all parties." *Id.*

"If the arbitrator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision." Jt. App. 31. If the arbitrator determines that there is not just cause, the employee is reinstated. *Id.*

B. On July 14, 1997, Eastern Coal initiated discharge proceedings against James Smith, an employee who began work at Eastern Coal in 1980 and held a variety of positions at the Company over the ensuing seventeen years. Pet. App. 7a, 24a & 26a. At that time, Smith was employed as a Mobile Equipment Operator ("MEO") on an Eastern Coal

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[1] Section (e) provides: "If neither the Employee nor the Mine Committee request immediate arbitration, the Employee shall be discharged at the conclusion of the fifth day of his suspension, and his case shall be processed in accordance with the provisions of Article XXIII (Settlement of Disputes)." Jt. App. 31.

road crew. *Id.* at 6a. The road crew's function is to maintain mine haulage roads. *Id.* Because MEOs may operate equipment on public roads and highways, they are required to have a commercial driver's license and are subject to the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation ("DOT regulations"), including the drug testing provisions of those regulations. *Id.*

The Company's suspension letter stated that the grounds for seeking Smith's discharge were: "Testing positive for illegal substances (cannabinoids) 2nd offense. Violation of company's drug and alcohol policy." Pet. App. 24a. Eastern Coal's drug policy provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels . . . the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." *Id.* at. 9a n. 4.

Smith filed a grievance challenging the Company's action on July 17, and the Union invoked the immediate arbitration procedure. Pet. App. 24a-25a. The arbitrator (Jerome T. Barrett) heard the Smith grievance on July 28. *Id.* at. 23a. At the hearing, the Company and the Union each presented witnesses and extensive documentary evidence, including copies of the DOT regulations and the Eastern Coal drug policy. *Id.* at. 23a & 27a. Two hours after the close of the hearing, Arbitrator Barrett issued a bench award. *Id.* at. 23a. The arbitrator subsequently submitted his written opinion and award on August 1. *Id.* at. 29a.

The issues presented to Arbitrator Barrett were the following:

> Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?
>
> And, if not, what is the appropriate remedy? [Pet. App. 24a.]

Based on Smith's "creditable" testimony, Arbitrator Barrett found that the positive drug test in question was a "one time

lapse" caused by "a personal/family problem." Pet. App. 28a. Given this finding, and taking into consideration Smith's "excellent employment record during 17 years with the company," *id.* at 26a, the arbitrator determined that there was not "just cause" to discharge Smith.

In reaching his conclusion, Arbitrator Barrett gave careful consideration to the fact that Smith had previously tested positive for marijuana in March 1996, that the Company had attempted to discharge Smith on that occasion, and that Arbitrator Ross had reduced the discharge to a 30-day suspension without pay. Pet. App. 25a.[2] Arbitrator Barrett noted that Arbitrator Ross' award required that Smith participate in a substance abuse program and submit to random drug testing by the prior arbitration, *id.*, and that Smith "appeared to be making a good faith effort to be rehabilitated." *Id.* at 27a. In this regard, Arbitrator Barrett observed that Smith had "tested negative on April 24, 1996, July 16, 1996, October 11, 1996, and January 27, 1997." *Id.* at 26a.

Arbitrator Barrett also gave careful consideration to the fact that "drugs have a negative impact on job performance, safety and company liability." Pet. App. 28a. To meet this concern, the arbitrator carefully crafted the remedy "to assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved." *Id.*

The "Award" entered by Arbitrator Barrett provided:

The grievance is sustained and the grievant is returned to work on October 20, 1997 under the following conditions:

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[2] The 1996 positive test occurred when Smith bid to transfer from his job as a drilling operator to become a Mobile Equipment Operator. Pet. App. 7a. A drug test was required at that time, under the DOT regulations, because the MEO position requires a commercial driver's license. *Id.*

1. No back pay for any loss during his suspension.

2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the Company and the Union for the arbitrators' bills in both the Ross and Barrett cases.

4. Grievant will provide the Union and the Company with a signed, undated letter of resignation which the Company may date and accept if the Grievant tests positive for any illegal drug in the next five years.

5. During the Grievant's suspension periods, the Grievant's name shall remain in the Company's random drug testing program. If the Grievant fails to take a required test during his suspension, the Company can date and accept his resignation letter.

6. The Company and Union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above. [Pet. App. at 29a.]

Pursuant to its obligations under the DOT regulations, Eastern Coal had referred Smith to Southern Highland Community Mental Health Center for rehabilitation. *See* 49 CFR § 382.605(a). And, shortly after Arbitrator Barrett issued his award, Smith enrolled in a six week drug education program at the Southern Highland Center. Def. Mine Workers' Combined Mem. App. B, Ex. 3 (Dkt. 29). On October 14, 1997, Sandy Rogers, a Substance Abuse Counselor at the Center, wrote to Glen Forren, Eastern Coal's Manager of Employee Relations, certifying that Smith had "successfully completed" the program. *Id.*

C. On August 18, 1997, Eastern Coal filed suit in the Southern District of West Virginia "to vacate [the] labor arbitration award," invoking the district court's jurisdiction pursuant to § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Jt. App. 7. The Union filed a counterclaim seeking enforcement of the award. *Id.* at 19-20.

In the district court, Eastern Coal's primary basis for challenging the award—and the only basis that is still pertinent in this Court—was that "[b]ecause the Barrett Award refuses to allow EACC to discharge Mr. Smith for testing positive for illegal drug use while employed in the MEO position," the award "violates the well-defined and dominant public policy against performance of safety-sensitive jobs while under the influence of illegal drugs." Jt. App. 11-12. In this regard, the Company claimed that, "[b]ecause the Barrett Award clearly violates this public policy, it does not draw its essence from the Wage Agreement and it must be vacated." *Id.* at 12.

Ruling on cross-motions for summary judgment, the district court (Cohenhaver, J.) determined that "Arbitrator Barrett's award draws its essence from the Wage Agreement," Pet. App. 17a, and that "the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations," *id.* at 21a. The district court found that the award drew its essence from the agreement on the following grounds:

> Inasmuch as the substance abuse policy calls for the removal of employees in safety sensitive positions, but does not call for mandatory discharge, the court finds that the arbitrator's award, suspending Mr. Smith for two and one-half months without pay, and reinstating him subject to strict conditions, is "rationally inferable" from the Wage Agreement. [*Id.* at 16a.]

And, the court concluded that the award was not contrary to public policy for the following reasons:

> Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it

> cannot be said that the DOT Regulations specifically militate against the relief ordered by the arbitrator in this case. [*Id.* at 21a (internal quotation marks and citation omitted).]

Based on these rulings, the district court entered judgment enforcing the award. *Id.*

On appeal, the Fourth Circuit (Widener, Ervin & Wilkins, JJ.) affirmed the district court in an unpublished per curiam decision. Pet App. 4a. Eastern Coal's petition for rehearing *en banc* was denied without a single member of the Fourth Circuit calling for a poll of the court. *Id.* at 22a.

SUMMARY OF ARGUMENT

I. Under § 301 of the Labor Management Relations Act, a court may "refus[e] to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy" if, and only if, the award "violate[s] some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents," and thus "create[s] an[] explicit conflict with [those] laws and legal precedents." *Paperworkers v. Misco*, 484 U.S. 29, 42 & 43 (1987).

Eastern Coal challenges as contrary to "public policy" an arbitration award reinstating—subject to stringent sanctions and preconditions—an employee who tested positive for marijuana. The "public policy" relied upon by Eastern Coal in challenging the arbitration award is the policy of the Omnibus Transportation Employee Testing Act of 1991 and the regulations issued by the Department of Transportation pursuant to that statute. The courts below properly rejected this challenge to the arbitrator's application of the "just cause" provision in the governing collectively bargained "Discharge Procedure."

The Omnibus Testing Act and the DOT regulations do not call for the discharge of an employee who has tested positive

for drugs. Rather, the regulations provide that such an employee is to be removed from a safety sensitive job until the employee has completed the specified rehabilitation program and tested negative in the specified return-to-duty drug test.

In its rulemaking process, DOT considered imposing short periods of suspension from employment for employees who test positive, but decided against imposing those penalties in issuing the final regulations. DOT also considered requiring employers to retain employees on the payroll during the rehabilitation process and considered according employees a public right to return to their safety sensitive position once they completed rehabilitation and tested negative.

But in the end, and in conformity with employer requests, DOT determined that these matters should be left to private decisionmaking, including through collective bargaining. And, the final regulations expressly preserve whatever rights in this regard employees may have through contract, including a collective bargaining agreement.

Given DOT's considered decision to leave questions of discharge based on positive drug tests to labor-management negotiations, an arbitration award that reinstates an employee—subject to substantial sanctions and conditions consistent with the requirements of the regulations—cannot possibly be contrary to the public policy of the Omnibus Testing Act and the DOT regulations.

II. The federal law of contracts under LMRA § 301 is derived from federal labor policy. Thus, each component part of the § 301 contract law—including the "public policy" exception to the enforcement of arbitration awards—must be consistent with federal labor policy.

Federal labor policy strongly favors the enforcement of agreements to settle labor disputes by binding arbitration.

Federal labor policy also strongly favors free collective bargaining and discourages government interference in setting the terms of collective bargaining agreements.

The only LMRA § 301 public policy standard that gives proper weight to these two basic federal labor policies is the standard that provides a carefully delimited judicial authority to set aside an arbitration award where the award itself is unlawful or where the award directs one of the parties to engage in unlawful conduct.

In contrast, the imprecise and general public policy standard advocated by Eastern Coal goes too far toward undermining the finality of arbitration awards and toward permitting the courts to substitute their resolution of a collective bargaining issue for the resolution provided by the parties in their agreement to be a proper LMRA § 301 public policy standard.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE LABOR ARBITRATION AWARD HERE AND THE OMNIBUS TESTING ACT OR THE DOT REGULATIONS IMPLEMENTING THAT ACT.

A. Eastern Coal's claim in this case is that a labor arbitration award rendered under the governing collective bargaining agreement is contrary to the public policy of the Omnibus Transportation Employee Testing Act of 1991, P.L. 102-143, Tit. V, 105 Stat. 952 (1991)("Omnibus Testing Act"), and the implementing Department of Transportation regulations and that the award is, therefore, unenforceable.

The arbitration award in question concludes that, in the circumstances, Eastern Coal employee James Smith's June 27, 1997 positive drug test for marijuana did not provide the contractually required "just cause" for Eastern Coal to

discharge Smith. On that basis, the award reduces Smith's discharge to a three month unpaid suspension from employment and—provided that Smith meets four specified conditions—orders him "returned to work" following that suspension. Pet. App. 29a.[3]

Paperworkers v. Misco, 484 U.S. 29 (1987), the Court's most recent labor-arbitration/public-policy case, involved an employer public policy challenge to an arbitration award reinstating an employee who had been discharged from a hazardous job for alleged work-site marijuana possession. Eastern Coal's claim and the legal issue the claim raises thus track the *Misco* employer's claim and the legal issue there. That being so, the basic principles stated in *Misco*—which elaborate on the approach of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983)—provide the proper starting point for analyzing Eastern Coal's claim, and we therefore begin by summarizing those principles.

At the outset, *Misco* and *W. R. Grace* make it plain that in a suit brought under § 301 of the Labor-Management Relations Act, "a court may not enforce a collective-bargaining agreement that is contrary to public policy,' and . . . that 'the question of public policy is ultimately one for resolution by the court.' " *Misco*, 484 U.S. at 43 quoting *W.R. Grace*, 461 U.S. at 766.

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[3] The award imposes four conditions on Smith's reinstatement. First, by "reinstat[ing]" the earlier Ross award, Pet. App. 29a, which "required [Smith] to participate in a substance abuse program," *id.* at 25a, the award requires Smith to get whatever "counseling" is necessary, *id.* at 29a. Second, the award requires Smith to "reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case." *Id.* Third, Smith is required to "provide the union and company with a signed, undated letter of resignation which the company may date and accept if [Smith] tests positive for any illegal drug in the next five years." *Id.* Fourth, "[d]uring his period of suspension," Smith is required to participate "in the company's random drug testing program." *Id.*

At the same time, *Misco* and *W.R. Grace*

> caution[] . . . that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " [*Misco*, 484 U.S. at 43 (emphasis in original), quoting *W.R. Grace*, 461 U.S. at 766, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945).]

Misco then identifies "[t]wo points [that] follow from *W.R. Grace*":

> First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. [484 U.S. at 43.]

In the second regard, *Misco* and *W.R. Grace* state that the threshold question in the public policy "examination" is "whether the award create[s] any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.' " *Misco*, 484 U.S. at 43, quoting *W.R. Grace*, 461 U.S. at 766. And, *Misco* emphasizes that "[a]t the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced." 484 U.S. at 43.[4]

B. "At the very least," then, to prevail on its public policy claim Eastern Coal must "clearly show[]" that the arbitrator's

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[4] *Misco* held that the court of appeals' application of the public policy exception failed both of these requirements. *See* 484 U.S. at 44-45.

interpretation of the collective bargaining agreement in the Smith award "violate[s] some explicit public policy" in the Omnibus Testing Act and the implementing DOT regulations and thereby creates an "explicit conflict" with the statute and the regulations. *Misco*, 484 U.S. at 43.

Misco does not define or otherwise elaborate on the nature of the necessary "violation of [public] policy" and resulting "explicit conflict" between the award and positive law, except by way of example in finding no such violation or conflict there.[5] Given that limited guidance and the different glosses placed on *Misco* by the courts of appeals, the courts below—drawing on both the First, Fifth, Eighth and Eleventh Circuit cases relied upon by Eastern Coal, *see* Pet. Br. 22 n. 11, and on the Ninth Circuit case law—put the *Misco* standard into the following operational terms: "whether or not there is a well defined and dominant public policy militating against the arbitrator's decision in this case." Pet. App. 18a. *See id.* at

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[5] In this regard, the *Misco* Court stated:

> [T]he assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F.2d, at 743. A refusal to enforce an award must rest on more than speculation or assumption. [484 U.S. at 44.]

And, the Court added that it would be wholly inappropriate for the court of appeals to draw inferences and make findings of fact as to whether an employee "had ever been or would be under the influence of marijuana while he was on the job" based on the court's review of the evidence:

> The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. [*Id.* at 45.]

18a-20a.[6] Following that lead, we turn to an inquiry whether the Omnibus Testing Act and implementing DOT regulations in any sense "militate against the arbitrator's decision."

Succinctly stated, the arbitrator's interpretation of the collective bargaining agreement is the following: that the "just cause" provision limits Eastern Coal's prerogative to discharge bargaining unit employees who test positive for marijuana, including those who test positive while holding truck driving positions; that, in the circumstances, the discharge of Smith transgressed those limits; and that after Smith had served a three month unpaid suspension, and fulfilled other conditions, Eastern Coal was required to return him to work in the bargaining unit.

According to Eastern Coal, that interpretation of the collective bargaining agreement "makes a mockery of the drug testing regime mandated by Congress [in the Omnibus Testing Act] and the DOT regulations." Pet. Br. 43. As the Brief for the United States ("U.S. Br.") filed in this case demonstrates, and as we develop below, Eastern Coal

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[6] The "militates against" standard was articulated by the Ninth Circuit. *See Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1212-13 (9th Cir. 1989)(*en banc* plurality opinion), *cert. denied*, 495 U.S. 946 (1990), citing the majority opinion in *E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d 611, 615-616 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

Conspicuously absent from the precedents cited by the courts below are those of the District of Columbia Circuit, the one circuit that has expressly limited the public policy exception to cases where the arbitration award requires a violation of law. *See Northwest Airlines v. Air Line Pilots*, 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). *See also E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d at 617-620 (Easterbrook, J., concurring). In view of Eastern Coal's assertion, Pet. Br. 28-29, that the courts below followed the D.C. Circuit's lead, it is significant that the Ninth Circuit has expressly reserved judgment on the validity of the D.C. Circuit's standard. *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d at 1212 n. 12.

completely misunderstands the Omnibus Testing Act drug-testing regime.

The Omnibus Testing Act and the DOT regulations neither mandate the discharge of covered employees who test positive nor grant employers an absolute prerogative to effect such discharges. To the contrary, "[t]he DOT regulations expressly contemplate the prospect that drivers who test positive will (after completion of specified requirements) eventually be permitted to resume safety-sensitive duties." U.S. Br. 22-23. The regulations both "establish legal prerequisites to the resumption of safety-sensitive duties by drivers who have tested positive for illegal drugs" and "leav[e] to private ordering the determination whether such workers will in fact be reinstated." *Id.* at 15.

The brief for the United States then concludes, with the most scrupulous understatement, that since "[t]he regulations . . . reflect the view that the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering," it is "difficult to see how reinstatement in accordance with the regulatory requirements, when decreed by the parties' chosen decisionmaker, could make a 'mockery' of the agency's rules." U.S. Br. 23.

C. The Omnibus Testing Act, in the most general terms, directs the Secretary of Transportation to "prescribe regulations that establish a program requiring motor carriers to conduct . . . testing of operators of commercial vehicles for the use of a controlled substance." 49 U.S.C. § 31306(b)(1)(A). Thus, it is the Secretary's comprehensive drug testing regulations that elaborate the Act's basic commands. 49 CFR Part 382. The regulations in effect at the time of Smith's discharge were issued on February 15, 1994 by the Department of Transportation's Federal Highway

Administration ("FHWA"). 59 Fed. Reg. 7484 (1994).[7] DOT has, moreover, supplemented the regulations with "Regulatory Guidance" issued through the Department's Federal Motor Carrier Safety Administration (formerly part of the FHWA). DOT, *Regulatory Guidance to the Motor Carrier Safety Regulations* (April 1, 2000) ("DOT, *Regulatory Guidance*").

1. As the Omnibus Testing Act directs, the DOT regulations provide for drug-testing of commercial motor vehicles drivers. Employers of such drivers are required to administer tests before a driver first performs safety-sensitive functions, 49 CFR § 382.301 ("Pre-employment testing"), and to continue to administer random drug tests during employment in a safety-sensitive position, 49 CFR § 382.305 ("Random testing"). In addition, employers must test drivers as soon as possible following an accident, 49 CFR § 382.303 ("Post-accident testing"), and whenever the employer reasonably suspects the driver has been using a controlled substance, 49 CFR § 382.307 ("Reasonable suspicion testing").

The purpose of the drug-testing regulations "is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49

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[7] These regulations were based, in large part, on drug-testing regulations previously issued by the FHWA on November 21, 1988. 53 Fed. Reg. 47134 (1988). It is the DOT's understanding that in enacting the 1991 Omnibus Testing Act, "Congress recognized that the FHWA ha[d] already issued regulations for controlled substance testing" and that "it [wa]s the intent of Congress that FHWA's [1988] controlled substances regulations be incorporated into the regulations required to be issued under the Omnibus Act." 57 Fed. Reg. 59567 (1992). Given DOT's express reliance on the product of its 1988 rulemaking in framing the regulations issued in 1994, we draw upon the 1988 rulemaking materials insofar as they are pertinent to the 1994 regulations.

CFR § 382.101. The testing regime is designed to be a largely prophylactic means toward this end.

A positive drug test provides only the limited information that the employee has, at some prior point, used the controlled substance in question. The test result does *not* show that the employee was under the influence of the controlled substance at the time of testing.[8] It follows that the test cannot show that the employee has ever been under the influence of the controlled substance while at work or that the employee ever will be under the influence of a controlled substance while at work. That being so, some indeterminable number of drivers who test positive will not threaten the public by performing their safety-sensitive jobs while under the influence.

Given these limits and uncertainties, the fact that an employee tests positive standing alone does not dictate the employment consequences to be visited upon the employee in the interest of protecting public health and safety. That is particularly plain in the Omnibus Testing Act context, since Congress declared that "rehabilitation is a critical component of any testing program for . . . use of illegal drugs and should be made available to individuals, as appropriate," § 1(7), 105 Stat. at 953, and Congress directed the DOT to "prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are found to have used . . . a controlled substance," and to "decide on the circumstances under which those operators

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[8] As the United States explains in its brief:

> That rule [against reporting for duty after testing positive] does not reflect a judgment that every individual who tests positive for illegal drugs is in fact impaired. DOT has recognized that "drugs may stay in the body for some time and the presence of drugs in urine does not necessarily mean that the person was affected by the drugs on the day tested or during the performance of safety-sensitive functions." 57 Fed. Reg. at 59,393-59,394. [U.S. Br. at 14 n. 5.]

shall be required to participate in a program," 49 U.S.C. § 31308.

Against this background, DOT's determination of what is necessary on a positive drug test is as follows:

When a driver tests positive, the DOT regulations require the employer to take two steps. First, the employer must assure that the driver does not perform any safety-sensitive function until he or she has completed the rehabilitation process prescribed by the regulations. 49 CFR §§ 382.501(b) & 382.605(c). Second, the employer must inform the driver of the available rehabilitation resources. 49 CFR § 382. 605(a).

Section 382.605 of the regulations spells out the required rehabilitation process through which a driver, who has tested positive, may "return to duty" in a safety sensitive position. The driver is "evaluated by a substance abuse professional [SAP]" to "determine what assistance, if any, the employee needs in resolving problems associated with . . . controlled substance use" and to prescribe any necessary rehabilitation. 49 CFR § 382.605(b). Before returning to a "safety sensitive" job, the driver must pass "a controlled substances test with a verified negative result." 49 CFR § 382.605(c)(1). And, before a driver who has been "identified [by the SAP] as needing assistance in resolving problems associated with . . . controlled substance use," is permitted to return to safety-sensitive work, the driver is subject to further "evaulat[ion] by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed." 49 CFR § 382.605(c)(2)(i). On returning to work, the driver is also subject to "unannounced follow-up . . . controlled substances tests administered by the employer following the driver's return to duty . . . as directed by the substance abuse professional." 49 CFR § 382.605(c)(2)(ii).[9]

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[9] DOT has explained that "[e]mployees testing positive while in follow-up testing are subject to the same specific DOT operating

The Department of Transportation has summarized this "SAP process" as follows:

> Safety sensitive functions may not be performed until the individual has been evaluated by an SAP, complied with any recommended treatment, has been re-evaluated by an SAP, has been allowed by the SAP to return to work and has passed a return to duty test. [DOT, *Regulatory Guidance* § 382.501, Question 1.]

In other words, DOT treats a driver's positive random test as providing sufficient basis for concern that the driver might perform safety sensitive functions while under the influence to require the driver to be put to a program of professional evaluation, rehabilitation and retesting aimed at ending the driver's drug use and thereby alleviating that concern.

In reaching this conclusion, DOT did give consideration to imposing the additional employment consequence of short driving suspensions for drivers who tested positive for drug use more than once within a three year period. 57 Fed. Reg. at 59576 Table III & 59585 § 382.1107. The Department's 1992 proposed drug-testing regulations provided that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle . . . for a period of 60 consecutive days." 57 Fed. Reg. at 59585 § 382.1107(a)(2)(i). The suspension for a driver who tested positive "three or more times in separate incidents" during a three year period was "120 consecutive days." 57 Fed. Reg. at 59585 § 382.1107(a)(2)(ii).

In the end, however, DOT decided to "not include[] any CDL [commercial driver's license] suspensions or other disqualifications . . . for a controlled substances violation" in

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administration rules as if they tested positive on the initial test." DOT, *Regulatory Guidance* § 382.605 Question 15. *See* U.S. Br. 20-21.

the form of a positive drug-test. 59 Fed. Reg. at 7493. Thus, when a driver tests positive, "[a]ll the rules require is [that the employee be] remov[ed] from safety-sensitive functions," 59 Fed. Reg. 7302, 7332 (1994), and that "[b]efore [such] an employee returns to performing safety-sensitive functions, the [rehabilitation] requirements of § 382.605 must be met," DOT, *Regulatory Guidance* § 382.605, Question 20.

It is worthy of note, in this regard, that the DOT regulations draw a sharp distinction between a driver who tests positive and a driver who is convicted of driving under the influence of drugs. The "[r]egulations . . . impose disqualifications and penalties for driving under the influence of controlled substances . . . [that] are intended to rid the highways of drivers . . . who pose a threat to the public." 57 Fed. Reg. at 59576. *See* 49 CFR §§ 383.51(b) & 391.15(c) (prescribing a one year suspension for a first DUI offense, a ten year suspension for a second DUI offense, and a life-time suspension for a third DUI offense).

2. In elaborating the Omnibus Testing Act drug testing regime, DOT gave close attention to two related questions concerning the retention in employment of a driver who has tested positive. The first concerns maintaining such a driver on the payroll while he or she completes the rehabilitation process prescribed by the regulations; the second concerns the driver's return to a safety-sensitive job after completing rehabilitation.

a. With regard to the first question, DOT has made it clear that "an employee who tests positive [may] be retained in a non-driving capacity" during the SAP process. DOT, *Regulatory Guidance* § 382.605, Question 20. Prior to completion of the SAP process, such an employee "may perform any duties for an employer that are not considered 'safety-sensitive functions.'" DOT, *Regulatory Guidance* § 382.501, Question 1. At the same time, DOT has determined that "employers who remove an employee from a

safety-sensitive function should not be obligated [by the regulations] to place that employee in another position or compensate the employee." 59 Fed. Reg. 7302, 7332. (1994).

While the regulations do not require an employer to retain a driver on the payroll during rehabilitation, DOT has counseled that "[t]he SAP process has the potential to be more complicated when the employee is not retained by the employer." DOT, *Regulatory Guidance* § 382.605, Question 5. And, DOT has, therefore, "encourage[d] those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their drivers, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs." 59 Fed. Reg. at 7502. *See* U.S. Br. 14 n.6.

Subject to that counsel, however, DOT decided to "*leave the specific conditions under which an employee is removed*, such as whether or not the employee is paid or moved to another non-safety-sensitive position, *to employer policies or collective bargaining*." 59 Fed. Reg. at 7332 (emphasis added).

b. The second, closely related question to which DOT has given careful consideration is whether "a driver [should] be provided with employment reinstatement rights at the completion of a rehabilitation program and a negative test for controlled substances." 53 Fed. Reg. at 47148.

When DOT took up the question of revising its drug testing regulations after the enactment of the 1991 Omnibus Testing Act, the Department began by reiterating the determination made in drafting the 1988 drug testing regulation that *whether to "require employers to provide or pay for rehabilitation or to hold a job open for an employee with or without salary . . . should be left for management/employee negotiations.*" 57 Fed. Reg. 59382, 59405 (1992) (emphasis added).[10]

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[10] DOT began where it had left off in 1988, based on the understanding that "it is the intent of Congress that [the] current controlled substances

The course of the 1988 rulemaking in this regard was as follows. The Department "proposed several alternatives for employee assistance programs and rehabilitation" that addressed the issue of reinstatement following rehabilitation. 53 Fed. Reg. at 47148. "Under the first three options, . . . the employer would have been *required* to hold the employee's position open while the employee underwent rehabilitation." *Id.* (emphasis added).[11]

In response to the 1988 DOT proposal, "there was a divergence of views on the criteria for providing rehabilitation and who should assume the costs of such a program." 53 Fed. Reg. at 47148. In particular, "[t]hose commenters representing motor carriers were in favor of *leaving the decision to provide rehabilitation and reemployment rights to management-labor negotiations.*" *Id.* (emphasis added).

While DOT "recognize[d] the significance of the arguments raised in defense of broad rehabilitation opportunities and job security for employees who use drugs," the Department "decided that motor carriers will not be required, by th[e] rule, to offer an opportunity for rehabilitation or to provide job security to drivers who fail a drug test." 53 Fed. Reg. at 47148. Rather, the Department determined that "*[i]ssues such as termination*" for a positive drug test "*are appropriately the subject of labor-management negotiations.*" *Id.* (emphasis added). The Department explained that this approach "provides the most flexibility to *labor and management* to determine the need for and shape of any rehabilitation program." *Id.* (emphasis added).

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regulations be incorporated into the regulations required to be issued under the Omnibus Act." 57 Fed. Reg. at 59567.

[11] While the DOT's proposal only required the employer to give an employee one chance for reinstatement after testing positive, the Department made clear that the employer was free to offer "more rehabilitation options than the minimums the FHWA proposes," stating that, "for example, an employer could voluntarily offer two chances at rehabilitation rather than one." 53 Fed. Reg. 22268, 22277 (1988).

In the 1992-94 rulemaking, as in 1988, "[c]onsiderable controversy was generated in the rule-making process as to *whether requirements should be imposed upon the carriers to provide* rehabilitation treatment and *reemployment rights*." W. Kenworthy, *Transportation Safety Law Practice Manual* ¶ 10.102(c), pp. 10-14.A.1-15 (1997)(emphasis added). Again, in this second round of rulemaking, as in 1988, the DOT concluded that *whether to "require employers to provide or pay for rehabilitation or to hold a job open for a driver with or without salary . . . should be left to management/driver negotiations*." 59 Fed. Reg. at 7502 (emphasis added).

c. Consistent with the decision to "leave the specific conditions under which an employee [who tests positive] is removed [from a safety sensitive position] . . . to . . . collective bargaining," 59 Fed. Reg. at 7332, the DOT regulations recognize that the employer's exercise of independent authority to impose additional sanctions for a positive drug test are "subject to any constraints on management discretion (*e.g.*, an agreement to arbitrate) that the employer has voluntarily assumed." U.S. Br. 13.

Indeed, the regulations expressly preserve the limits on management prerogative achieved through collective bargaining by stating that "nothing in this part shall be construed to affect . . . the rights of drivers" in this regard and that only "express[] provi[sions]" in the regulations can override such rights. 49 CFR § 382.111.[12] In this regard, § 382.111 of the regulations states:

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[12] To underscore the independence of any employer-imposed discipline, the regulations require that if an employer "supplie[s] to drivers . . . information on additional employer policies with respect to the use of . . . controlled substances, including any consequences for a driver found to have a specified . . . controlled substances level, . . . such additional policies or consequences must be clearly and obviously described as being based on independent authority" and *not* on the regulations. 49 CFR § 382.601(c).

> Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

Among the "rights with respect to testing and rehabilitation," 49 CFR § 382.111, which the regulation may *not* be "construed to affect," *id.*, are the "mechanisms in . . . agreement[s] through which employees may have an opportunity to challenge . . . proposed disciplinary actions resulting from [drug] testing" that Congress specifically "affirm[ed]" in passing the Omnibus Testing Act. S.Rep. No. 102-54, 102d Cong., 1st Sess. 8 (1991).

In sum, "DOT [has] chose[n] to entrust private parties with significant discretion to determine whether reinstatement is appropriate in particular cases." U.S. Br. 20. It follows, as the Brief for the United States observes, that as long as

> the regulatory prerequisites to reinstatement [are satisfied], and the decisionmaker chosen by the parties concludes that reinstatement . . . is appropriate, enforcement of the arbitral award could not plausibly be deemed inconsistent with any policy judgment reflected in the DOT regulations. To the contrary, a judicial decree setting the award aside would be inconsistent . . . with the regulatory balance struck by DOT . . . . [U.S. Br. 20.]

C. While not directly relevant to the merits of Eastern Coal's public policy claim, the Company's harsh attack on the substance of the arbitration award warrants a brief word in the form of a rejoinder outlining the basis for the award and the substantial employment sanctions and strict conditions on reinstatement imposed by the arbitrator.

The arbitrator's decision to reduce Smith's discharge to a three month suspension rests on three subsidiary findings: first, that Smith has "been an otherwise solid employee for a significant period of time," Pet. App. 27a; second, that "[f]rom April 1996 to July 1997, [Smith] appeared to be making a good faith effort to be rehabilitated," *id.*; and third, that the June 1997 positive test was a "one time lapse" caused by "a personal/family problem," *id.*, at 28a. Eastern Coal has not challenged these findings, nor could the Company have challenged them under this Court decision in *Misco*. *See Misco*, 484 U.S. at 44-45.

In framing his award, Arbitrator Barrett noted that "the unambiguous notice of the need to correct his behavior" provided by Arbitrator Ross' award had not completely resolved Smith's marijuana problem. Pet. App. 28a. Accordingly, Arbitrator Barrett designed a remedy intended to "assure that the company and union will not be required to use arbitration again for this greivant where drugs are involved." *Id.* Arbitrator Barrett attempted to provide this assurance by imposing substantially stricter penalties on Smith than had Arbitrator Ross and by imposing conditions on Smith's reemployment that incorporated and went beyond the conditions imposed by Arbitrator Ross. *Id.* at 29a.

The award imposes three penalties on Smith. First, Smith was suspended without pay from all employment—not just truck driving—for a period of more than three months. Pet. App. 29a. Beyond that Smith was required to pay a substantial fine in the form of reimbursing the Union and the Company for the costs of his two discharge arbitrations. *Id.* And, Smith was required to sign a letter of resignation that would become effective should he test positive a third time. *Id.*

By contrast, the penalties which DOT considered—but did not impose—would have suspended Smith for only 60 days, rather than the 98 days for which the arbitrator suspended

him, and would have provided for a 120-day suspension on a third positive test, rather than the unreviewable discharge provided for by the arbitrator. *Compare* 57 Fed. Reg. at 59576 Table III *with* Pet. App. 29a.

In addition to imposing these substantial penalties, the arbitrator conditioned Smith's reinstatement in a manner that insures full compliance with the DOT regulations.

By "reinstat[ing]" the prior arbitration award, Pet. App. 29a, which "required [Smith] to participate in a substance abuse program," *id.* at 25a, the arbitrator clearly intended that "counseling [would] result[] from th[e] award," *id.* at 29a. DOT has estimated that "the least time that it would take to complete a rehabilitation program would be 28 days." 53 Fed. Reg. at 47148. Smith was suspended for more than three times that long, a period more than adequate to complete any rehabilitation program that might have been prescribed within that time. *See* U.S. Br. 17 ("Depending on the SAP's evaluation, any required rehabilitation program might feasibly have been completed before the end of Smith's suspension.").[13]

It is very much to the point that the arbitrator does *not* specify into which position Smith should be placed upon reinstatement, only that he is to be "returned to work." Pet. App. 29a. Smith had worked for Eastern Coal for some seventeen years, often in non-driving positions, *id.* at 7a, and had an "excellent employment record," *id.* at 26a. Thus, even *if* an SAP determined that Smith needed to participate in a rehabilitation program, and even *if* he were unable to complete that program during his suspension, Eastern Coal could still have complied with the award by simply placing Smith in one of the many non-safety-sensitive positions

[13] As the Union demonstrated in post-judgment proceedings before the district court, Smith did in fact complete the SAP process before the reinstatement date set by the arbitrator. *See* Def. Mine Workers Combined Mem. App. B, Ex. 3 (Dkt. 29).

covered by the collective bargaining agreement. *See Misco*, 484 U.S. at 45.

The award also subjects Smith to random drug tests during his period of suspension, Pet. App. 29a, in addition to the return-to-duty test he would have to take before returning to his position as a truck driver, 49 CFR § 382.309(b). And, should Smith fail any of these tests—or any test during the next five years—he is subject to unreviewable discharge. Pet. App. 29a.

In sum, the substance of the arbitration award confirms the Omnibus Testing Act judgment that "the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering." U.S. Br. 23.

II. THE LMRA § 301 PUBLIC POLICY EXCEPTION JUSTIFIES A COURT'S REFUSAL TO ENFORCE A LABOR ARBITRATION AWARD ONLY IF THE AWARD ITSELF, OR THE CONDUCT THE AWARD REQUIRES, VIOLATES POSITIVE LAW

In its most basic terms, the LMRA § 301 public policy exception as stated in *Misco* is that a court may "refus[e] to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy" only where the award "violate[s] some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents," and thus "create[s] an[] explicit conflict with [those] laws and legal precedents." 484 U.S. at 42 & 43.

As we have noted, *Misco*—which like *W.R. Grace* concluded that there was *no* conflict between the award at issue and positive law—does not define or otherwise elaborate on the nature of the necessary "explicit conflict" between the award and positive law, except by example. We have, therefore, proceeded to this point on the lower courts'

premise that where a statutory "public policy militat[es] against the arbitrator's decision," Pet. App. 18a, there is an "explicit conflict" in *Misco* terms. And, we have shown there is no such conflict between the award here and the Omnibus Testing Act and the implementing DOT regulations. Simply stated, the regulations purposefully leave the discharge or retention of a driver who tests positive to private decisionmaking, either by the employer acting unilaterally or by the employer acting under an agreement reached through joint labor-management negotiations.

That direct response to Eastern Coal's "public policy" claim provides a showing that is more than sufficient to sustain the judgment of the court below. But we would be derelict if we did not state, and briefly explain, our position that the LMRA § 301 public policy exception should rest on a more limited and more certain "explicit conflict" requirement.

It is our contention that the proper LMRA § 301 public policy exception standard is the one the Court noted but found it unnecessary to address in *Misco*—that a labor arbitration award creates an "explicit conflict" with the relevant law and legal precedent justifying vacation of the award on public policy grounds only where "the award itself violates a statute, regulation or other manifestation of positive law or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12.[14]

A. The *Misco* "public policy" exception—whatever its precise dimensions—is necessarily an LMRA § 301 rule.

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[14] *American Postal Workers v. United States Postal Service*, 789 F.2d 1, 8-9 (D.C. Cir. 1986); *E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d at 617-620 (Easterbrook, J., concurring). *See* Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chicago-Kent L. Rev. 3 (1988); Easterbrook, "Arbitration, Contract, and Public Policy," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the Forty-Fourth Annual Meeting, National Academy of Arbitrators 65-77 (1992).

Suits to vacate labor arbitration awards, like suits to enforce such awards, are "[s]uits for violation of contracts between an employer and a labor organization," arising under LMRA § 301(a), *see* Jt. App. 7 ¶ 1, and it is basic that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).[15] *Misco* thus states one component of "an evolving federal common law grounded in national labor policy." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), quoting *Bowen v. United States Postal Service*, 459 U.S. 212, 224-225 (1983).

In the development of the law under LMRA § 301, common law contract rules do, of course, provide a reference point that, "if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Lincoln Mills*, 353 U.S. at 104. As a general matter, however, in determining the § 301 contract rules, the Court—out of recognition that "a collective-bargaining agreement 'is more than a contract.' "—has "not appl[ied] principles of ordinary contract law." *Bowen*, 459 U.S. at 224, quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).[16]

B. "In the common law of contracts, th[e public policy] doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements." *Misco*, 484 U.S. at 42. Two aspects of federal labor policy call for closely circumscribing such "judicial power" where the

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[15] *See also Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.").

[16] *See also Lucas Flour*, 369 U.S. at 102 ("incompatible doctrines of [common] law must give way to principles of federal labor law").

"private agreements" in question are collective bargaining agreements that provide for the final and binding resolution of labor-management disputes by arbitration.

First, "the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Lucas Flour*, 369 U.S. at 105. *See* 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.").[17] And, it has long been recognized that this aim "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

In cases arising under LMRA § 301, "the judiciary sits . . . to bring into operation an arbitration process, which substitutes for the older regime of industrial conflict." *Warrior & Gulf Co.*, 363 U.S. at 585. Thus, in deciding cases brought under § 301, the "[c]ourts are not to usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.' " *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562-563 (1976), quoting *American Mfg. Co.*, 363 U.S. at 566.

Since the arbitration tribunal's primary function is to interpret and apply the collective bargaining agreement, the

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[17] *See also Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 407 (1976) ("strong congressional preference for private dispute settlement mechanisms agreed upon by the parties"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974) ("strong federal policy favoring arbitration of labor disputes"); *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 263 (1962) ("In passing § 301, Congress . . . was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes.' "); *Lucas Flour*, 369 U.S. at 105 ("the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare").

most serious judicial usurpation is review of the arbitration award on the merits. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 596 (1960).

Second, and closely related to the federal labor policy on arbitration, is "this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980). *See* 29 U.S.C. § 171(a) (declaring "the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees" to be "the policy of the United States").[18]

Given the strength of the free collective bargaining policy, this Court has cautioned that "[i]t does not behoove a court to second-guess either th[e collective bargaining] process or its products." *California Brewers Ass'n*, 444 U.S. at 608. And, in terms that support our position on the nature and dimension of the proper LMRA § 301 public policy exception, the Court has held that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982). *See also Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212,

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[18] *See also Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977) ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . . ."); *Lucas Flour*, 369 U.S. at 104 ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace.").

219 (1980) ("If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.").

C. An open-ended public policy standard as advocated by Eastern Coal, Pet. Br. 22, invites standardless review of arbitration awards on their merits in a manner that rewrites the parties' agreement, and thus cuts too deeply against basic federal labor policies to be countenanced.

The collective bargaining agreement between Eastern Coal and the Union "specifically resolves [the] particular issue" of the employer's authority to discharge covered employees, *Carbon Fuel*, 444 U.S. at 219, and does so by making full use of arbitration as a "substitute for economic warfare," *Lucas Flour*, 369 U.S. at 105. That agreement provides that such discipline must be for "just cause" and that the final determination of whether there is just cause for a discharge shall be made by the arbitrator. The arbitrator here—after considering all of the relevant factors, including the DOT regulations—concluded that Smith's June 1997 positive drug test did not provide "just cause" to discharge Smith.

In bringing this case, Eastern Coal put its public policy challenge to the arbitration award in the following terms: "Because the Barrett Award clearly violates this public policy [against performance of safety-sensitive jobs while under the influence of illegal drugs], it does not draw its essence from the Wage Agreement and it must be vacated." Jt. App. 12. In other words, Eastern Coal argues that the public policy of the Omnibus Testing Act and the DOT regulations provide "just cause" as a matter of law to discharge any employee who tests positive and that the award here, by not treating a positive test as "just cause" *per se*, "does not draw its essence from the Wage Agreement and . . . must be vacated."

That is most certainly a request for a court to substitute its construction of the agreement for the arbitrator's. And, it is

not made any less so by the fact that the primary basis on which Eastern Coal claims "just cause" to discharge Smith is the DOT regulations, for the regulations are among the "many sources" to which the arbitrator may—and in this case did—"look for guidance" in resolving the dispute. *Enterprise Wheel*, 363 U.S. at 597.

What is more, Eastern Coal's request is wholly without a legitimate basis. The Company does not even pretend that the Omnibus Testing Act and the implementing DOT regulations state a policy in favor of discharging employees who test positive much less a policy sanctioning a unilateral employer discharge prerogative that is unreviewable under collectively bargained standards and through collectively bargained procedures.

What Eastern Coal's position comes down to is that the acknowledged general policy of the drug testing regime—protecting the public against the performance of safety sensitive functions by employees who are under the influence of drugs—entails an unstated subsidiary policy providing employers an unchallengable, absolute prerogative to discharge employees who test positive.

There is no iron logic, however, that requires the deduction of the employer-prerogative policy Eastern Coal asserts from the Act's general policy. The DOT rulemaking proceedings make that plain. As DOT recognized by leaving the matter to private decisionmaking, there is no single policy on employer discipline of employees who test positive that follows ineluctably from the general protective policies of the Act. Thus, what Eastern Coal seeks is not only judicial reversal of the arbitrator's award on the merits but reversal on a ground that is inadequate in its own terms.

It is equally to the point that, by challenging the arbitrator's "just cause" determination on public policy grounds, Eastern Coal aims to modify the substantive terms of the parties'

collective bargaining agreement insofar as that agreement subjects all employer discharge determinations to "just cause" review through the negotiated "Discharge Procedure." Jt. App. 30. The Company could have—but has not—bargained for an unreviewable authority to discharge an employer based on a positive drug test. *See* Bureau of Labor Statistics, *Alcohol and Drug Abuse Provisions in Major Collective Bargaining Agreements* 7 (Oct. 1990). Many other employers have done just that. For example, the current National Master Freight Agreement provides that, on a first positive drug test, an employee will be suspended for ten days and that, on a second positive test, "the employee shall be subject to discharge." National Master Freight Agreement, Uniform Testing Procedure § J(4), *available at* U.S. Dept. of Labor, Bureau of Labor Statistics, *Collective Bargaining Files* K nos. 5201 & 5202. *See also Wilder v. G.L. Bus Lines*, 2000 U.S. Dist. LEXIS 9524, *27-*28 (S.D.N.Y. 2000) (collective bargaining agreement adopted "the strict terms of the GL Bus Line's 'zero tolerance drug policy' ").

As this Court has recognized, the "legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process . . . would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored." *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962). Eastern Coal's attempt to use the public policy exception to acquire an employer prerogative plainly denied in the collective bargaining agreement is thus fundamentally inconsistent with the premises of the free collective bargaining system.

D. We recognize that Eastern Coal argues that "the policy of the labor laws favoring collective bargaining, arbitration of labor disputes, and limited judicial review of arbitration decisions" have "no place" when "an arbitration award

threatens public safety." Pet. Br. 24. But, such a "public safety" exception would cut a wide swath through the federal labor policy, as "the issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases." *Misco*, 484 U.S. at 45 n. 11. And, such an exception would run directly contrary to the determination of Congress that "the advancement of the general welfare, health, and safety of the Nation . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining." 29 U.S.C. § 171(a).

Not surprisingly then, when this argument for a safety exception was made in *Gateway Coal*, this Court expressly rejected it. In that case, the Third Circuit, had carved out a safety exception to the rules favoring labor arbitration on the theory that "[m]en are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so." *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (3d Cir.1972). In reversing the Third Circuit's decision in this Court rejected the notion "that safety disputes should be treated as *sui generis*." 414 U.S. at 376. The Court held that the federal policies favoring arbitration and free collective bargaining "are as applicable to labor disputes touching . . . safety . . . as to other varieties of disagreement." *Id.* at 379. In this regard, the Court noted that "[c]ertainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability." *Id.* And, the Court specifically found that "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other." *Id.*

The Omnibus Testing Act and the DOT regulations—by "leaving to private ordering the decision whether reinstatement is appropriate in a particular case," U.S. Br. 18

—follow the path laid out by this Court in *Gateway Coal*. The public safety is protected by the DOT regulations, which "describe in detail the conditions that an employee who tests positive must satisfy inorder to be eligible to resume safety-sensitive duties." *Id.* And, of course, an arbitration award that ordered reinstatement in violation of the DOT regulations would be unenforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). But, where, as here, the arbitration award contemplates that the reinstated "employee [will] satisf[y]] the regulatory prerequisites to resumption of safety-sensitive duties," the award cannot be set aside on the grounds that the DOT's "rules are insufficient to protect the public safety." U.S. Br. 19.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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